IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

SAMI AMIN AL-ARIAN, *et al.*,

Defendants.
_____/

SAMI AL-ARIAN'S RESPONSE TO THE GOVERNMENT'S MOTION FOR LEAVE TO FILE EX PARTE, IN CAMERA SUBMISSION UNDER CIPA

COMES NOW the Accused, Dr. Sami Amin Al-Arian, by counsel, and hereby files the following response to the United States Motion for Leave to File Ex Parte, In Camera Submission under CIPA.

INTRODUCTION

At the outset, the defense must concede that section (4) of CIPA, does permit an ex parte filing by the government. However, the particular circumstances of this case and the timeliness of the government's filing present a series of novel issues that this Court should be mindful of in examining any documents tendered by the government.

MEMORANDUM OF LAW

The CIPA statute was promulgated in an effort to prevent what was termed graymail. Graymail was defined as an effort by a defendant to threaten the government with the use of classified material by defendants. Thus the government in a graymail situation did not know the exact nature of the danger to the national interest the classified material in the possession of the defendant presented.

Thus, CIPA anticipated that the defense was the holder and possessor of classified material and as a result placed the burden of proof with respect to its use and release squarely on the defense.

See *United States v. Fawaz Yunis* 867 F2d 617 (1989):

> We hold, in short, that classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information, like a defendant seeking the informant's identity in *Roviaro*, is entitled only to information that is at least "helpful to the defense of [the] accused," *Roviaro*, 353 U.S. at 60-61. *Id.* at 21.

With respect to the analogy to *Rovario,* some Courts however, have viewed the *Rovario* type balancing as inappropriate and not mandated by CIPA. Thus there is a split of authority concerning the issue of whether an additional balancing test is required when dealing with discovery and/or admissibility of classified information. The issue is whether otherwise relevant information which happens to be classified may be non-discoverable or inadmissible because of its classified nature. As to discovery and admissibility of classified information, some courts have endorsed a balancing approach. See, e.g. *United States v. Sarkissian*, 841 F. 2d 959, 965 (9th Cir. 1988).

Courts, which have rejected a balancing approach, have instead applied the general rules of admissibility under Rules 401-403. See, e.g., *United States v. Cardoen*, 898 F. Supp. 1563 (S.D. Fla. 1995). Other courts have declined to take positions. See, e.g. *United States v. Yunis*, 924 F. 2d 1086, 1095 (D.C. Cir. 1991).

This issue is well illustrated in a sharply divided en banc decision from the Fourth Circuit. In a pre-trial hearing pursuant to CIPA concerning the admissibility of classified information, the en banc Fourth Circuit split 6-5 in holding that the defendant's right to prepare his defense had to be balanced against the public interest in preventing the

disclosure of classified information, as under *Rovario v. United States*, 353 U.S. 53 (1957) (recognizing a government privilege to protect informants). *United States v. Smith,* 780 F. 2d 1102, 1105 (4th Cir. 1985) (en banc). The Fourth Circuit declined to establish a "rigid rule" for the proper balance, stating that it would vary from case to case depending upon the crime charged, how essential the information was to the defense, and whether the information was merely cumulative or corroborative. *Id*. at 1110. The Fourth Circuit held specifically that the standard of admissibility for classified information "is at least more restrictive than the ordinary rules of relevance would indicate." *Id*.

The dissenters in *Smith*, as well as the commentators, criticized the majority for ignoring the fact that Congress specifically rejected a bill that suggested the balancing approach of *Rovario*. See Richard P. Salgado, Government Secrets, Fair Trials, And The Classified Information Procedures Act, 98 Yale Law Journal 427, 441 (1988). The courts are split on the issue of a *Rovario* balancing in a CIPA Section 6(a) relevancy hearing. Compare *United States v. Zenttl*, 835 F.2d 1059 (4th Cir. 1987) (balancing appropriate) and *United States v. Smith*, 780 F. 2d 1102 (4th Cir. 1985)(en banc) (same) with *United States v. Juan*, 776 F.2d 256 (11th Cir. 1985) (balancing inappropriate).

In the situation where the defense is in possession of the questioned materials, it is fair that the defense should bear the burden of establishing the materiality. However, in the instant case, the government is the possessor of all the questioned material. The defense knows nothing of its nature. The defense knows only what the government suggests about the materials.

"Some of this information arguably may be discoverable in the instant case under Rule 16, or the Brady Doctrine. Page 1, Doc. 619

"…in our view, this classified information is not discoverable because the United States has no intention of using the information at trial under any circumstances, and

second, the government does not believe that the documents meet the relevant threshold for production. Moreover, disclosure of this classified information would compromise significant and vital national security interests. Thus, the United States respectfully submits that upon a review of the ex parte, in camera submission, the Court would agree that these items are not discoverable, since the classified information is for the most part only marginally relevant, is not exculpatory, and would be neither helpful to the defense, lead to the discovery of helpful information, nor constitute material essential to the fair determination of this case." P.6 ,7 of Doc. 619

Even after the government's filing, the defense is without knowledge whether this so-called 'arguably exculpatory evidence' falls under the rubric of exculpatory evidence or Rule 16. This Court need be mindful that the rules regarding disclosure under these circumstances differ depending whether the material is characterized as Rule 16 or *Brady* materials.

> Defendants' right to discover documentary material controlled by the government rests on two grounds: the constitutional right to discover exculpatory evidence, as developed in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and the statutory right to documents which are material to the preparation of the defense, Fed.R.Crim.P. 16(a)(1)(C).
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> The Court has recently indicated that the constitutional right is rather narrow, applying only to material that "creates a reasonable doubt" about the defendant's guilt. United States v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402, 49 L. Ed. 2d 342(1976). Although Rule 16(a)(1)(C) has at times been interpreted to track closely with the constitutional standard, see United States v. Ross, 511 F.2d 757, 762 (5th Cir.), cert. denied, 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975), this court believes that documents are "material in the preparation of the defense" if there is a strong indication that they will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal. See United States v. Tanner, 279 F. Supp. 457, 470 (N.D.Ill.1967), rev'd on other grounds, 471 F.2d 128 (7th Cir. 1972), cert. denied, 409 U.S. 949. 93 S. Ct. 269, 34 L. Ed. 2d 220 (1972) (cited approvingly in Notes of Advisory Committee on 1974 Amendments to Rules of Criminal Procedure, 62 F.R.D. 271, 311 (1975)); Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo.L.J. 1276, 1278-80 (1966) (discussing meaning of "materiality" in predecessor to Rule 16(a)(1)(C)); cf. United States v. Crow Dog, 532 F.2d 1182, 1189 (8th Cir. 1976), cert. denied, 430 U.S. 929, 97 S. Ct. 1547, 51 L. Ed. 2d 772 (1977) (no Brady violation when undisclosed material would have been used for "minimal" impeachment purposes).

United States v Felt, 491 F.Supp.179, at 186.[1]

See also *U.S. v. George* 786 F. Supp. 11, where the Court noted:

> Although the classified nature of many of the documents affects this court's assessment of defendant's request, the basic rule governing discovery of documents in the hands of the prosecution by a defendant is Federal Rule of Criminal Procedure 16(a)(1)(C) which reads:
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> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(C)
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> The central requirement of Rule 16(a)(1)(C) is that the defendant must show that the documents or evidence sought to be discovered are material to the preparation of his defense. Although this hurdle is not a high one, "the evidence must not simply 'bear some abstract logical relationship to the issues in the case. . . . There must be some indication that pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor.'" United States v. Secord, 726 F.Supp. 845, 846 (D.D.C. 1989)(quoting United States v. Ross, 511 F.2d 757, 762 - 3 (5th Cir. 1975), cert. denied, 423 U.S. 836, 46 L. Ed. 2d 54, 96 S. Ct. 62). Nonetheless, the documents need not directly relate to the defendant's guilt or innocence. Rather, they simply must "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony or assisting impeachment or rebuttal." United States v. Felt, 491 F. Supp. 179, 186 (D.D.C. 1979). *Id* at 13.

The problem created by the government's pleading is manifest; unless the government is possessed with powers of precognition it is impossible for the government

[1] Since the *Augurs* decision, the Supreme Court has gone further in defining 'materiality'. In *United States v. Bagley,* 473 U.S. 667, the Court found that although the constitutional duty to disclose evidence is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal, whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant. The touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Id*. at 682.

through its lawyers to know the exact nature of the accused's defense. Absent such knowledge, discussions on whether a given piece of evidence is helpful or relevant to a particular defendant is at best speculative.

Other than the filed indictment, this Court is without knowledge of the government's theory of the case. The Court is less informed regarding the defense theory of the case. The defense is equally handicapped here. It knows what the defenses are, but has no idea what the government seeks to protect. Thus the Court, the government, and the defense are each, in their own way, blindly making an effort to judge the impact of this evidence.

How precisely is the Court to make an assessment of what is helpful to the defense under these circumstances? One can only imagine the myriad of materials that might be exculpatory where the government's theory of the case involves such issues as the Intifada, Occupied Territories, the relationship between Palestine and Israel, and the allegation that Sami Al-Arian was the leader of a secret sleeper cell of the P.I.J. The possibilities for exculpatory material being in the hands of the CIA, NSA, or any of the alphabet soup of intelligence agencies connected to the Defense and State Departments is truly beyond comprehension.

For example, since the State Department has stated publicly that the PIJ has never committed an act of terrorism in the United States,[2] one would be hard pressed to suggest that the information that underlies such a conclusion would not be exculpatory and therefore should be accessible to the defense.

[2] See United States Department of State: Patterns of Global Terrorism, 2003, Appendix B. "…The group has not yet targeted US interests and continues to confine its attacks to Israelis inside Israel and the territories…."

Despite these facts, **not one** document or piece of information has been turned over to the defense **as exculpatory**. This fact more than anything else reveals that these U.S. Attorneys view the whole process of providing exculpatory information with a jaundiced eye contrary to the court's holding in *Kyles v. Whitley* 514 U.S. 419 (1995)[3]. This is particularly true where the indictment in the case consists of 256 numbered paragraphs, 121 pages and nearly 50 counts. This is not a situation where the determination of *Brady* material is as simple as a murder case where the bullet and the gun don't match. The concept of what might be exculpatory, relevant and or helpful to the defense of a particular defendant requires a subtle and informed inquiry that is not the type of inquiry that these prosecutors, in this case, have ever expressed any willingness to conduct.

The danger in relying solely on the government to determine what is relevant and helpful to the defense, either under the rubric of Rule 16 or *Brady,* is best illustrated by recent events in Detroit. In *United States v. Koubriti, et al,*(attached hereto as *Exhibit A* and made a part thereof) the government's failure to disclose exculpatory materials resulted in the highly unusual circumstance of the Justice Department moving to dismiss its own indictment. The *Koubriti* case was similar to this one in that it had received extensive press, and the filing of the indictment was heralded by the Attorney General as breaking the back of terrorist organizations in the United States. Thus in both cases the stakes for each side were high. Ultimately, the Justice Department was required by the

[3] "The prudent prosecutor will resolve doubtful questions in favor of disclosure". This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. See *Rose* v. *Clark*, 478 U.S. 570, 577-578, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986); *Estes* v. *Texas*, 381 U.S. 532, 540, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965); *United States* v. *Leon*, 468 U.S. 897, 900-901, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984) *Id* at 440.

trial judge to conduct the type of nuanced search of its files that the defense believes is required here. After conducting that search with the knowledge of the defense theory, the Justice Department found (1) the prosecution failed to disclose matters, which viewed collectively, were material to the defense; See *Kyles* ; and, (2) the prosecution allowed an incomplete and misleading record to be presented regarding important issues.

Koubriti allowed for and encouraged a far more open discovery process than that which has been engaged here. The accused were permitted to see 302s and other discovery that simply have not been provided in this matter. It also appears that the trial judge expended considerable energy to assure that the government's *Brady* obligations were complied with; yet the government simply did not inform the judge of the evidence it wished to hide.[4] Despite this effort by the Court to assure the fairness of the proceedings in Detroit, the government was forced to acknowledge that the prosecutors had failed to provide the defense with obviously exculpatory evidence.

Any examination of the government's filing in *Koubriti* would reveal that the Justice Department has taken a far more expansive view of *Brady* than the view of the prosecutors in this matter.[5]

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[4] During trial, the Court repeatedly instructed the government to provide necessary discovery in a timely fashion. See, e.g., 9 Tr. 1474 ("I've asked you to provide them with the names of witnesses [that you are going to call the next day]. Don't hold it close to your vest, err on the side of caution and provide them with more rather than less."). In addition, the Court made clear that it would decide for itself whether materials in the government's possession were discoverable. When AUSA Corbett suggested that the government usually decides whether FB I interview memoranda contained Brady or Giglio material, the Court responded "Not in this Court." Id. at 1505. The Court then explained that virtually every Court in the District required the government to turn over 302s in advance unless there was a good reason not to. Id. at 1504-09. ….. Likewise, the Court followed the same procedure regarding other potential Giglio material…… Unfortunately, numerous developments since trial, including the discovery of significant materials not disclosed by the prosecution, have undermined each part of this three-legged stool. Fn.5

[5] For example, we have illustrated that the government has two translations for a single overt act. One translation conforms to the indictment one does not. We have asked for the name of the translator whose translation does not conform; however, we have been told that this is not exculpatory.

Among the concerns the Justice Department noted was that the prosecutors had failed to provide the defense evidence that was inconsistent with the government's theory of the case and had also failed to provide the defense with evidence consistent with the defense theory **as** required by *Kyles* and *Brady*.

Here the defense persists in the belief that there is substantial evidence under both the rubric of *Brady* and Rule 16 that the prosecution has not provided. It is hard to believe that the entire federal government would have allowed Dr. Al-Arian to function as a cell of the P.I.J. in the United States for more than 10 years while truly believing he in any way posed a real threat or danger to the United States. It is also hard to believe that none of the myriad of agencies in the United States Government ever undertook any threat assessments of Dr. Al-Arian or his alleged associates. Clearly, if any had been done, and Dr. Al-Arian had been found threatening in any way, he would have been restrained after 9/11/01.

The government simply has closed its eyes to this type of evidence where *Brady* and its progeny have made clear that this is exactly the type of information that should be made available to the defense.

In its pleading, the government seems to indicate that disclosure of *Brady* material turns in some way on whether the government intends to utilize the evidence in its case. The defense can conceive of only one circumstance where this might be true: if the evidence consists only of impeachment materials. If it were true in other instances regarding exculpatory or Rule 16 evidence, the government could eviscerate the constitutional or statutory requirements simply by not using the evidence.

The Defense should be provided an opportunity to provide ex parte, in camera submissions on the theory of the case and types of materials that they suspect is in the possession of the government that might contain exculpatory material.

Such an ex parte submission would permit the court some advocacy by the defense with regard to the government's motion here. Further it would preserve for the record the types of information that the defense believes available to the government but not to the defense that have yet to be provided by the government. Should there ever be a proceeding where the question was raised regarding the diligence of the defense re: exculpatory evidence a formal record would exist on this critical issue.

Under circumstances where the prosecution is making an ex parte, in camera submission to suggest that documents or items are neither material to the defense nor exculpatory, it is entirely appropriate to allow the defense to submit either an affidavit or present orally ex parte, in camera why the requested information might be material for preparation of a defense or exculpatory. *U.S. v. Clegg* 740 F. 2d 16,17, (9th Cir. 1984); *U.S. v Pointdexter* 698 F.Supp 316, 321 (D.D.C. 1988).

WHEREFORE, the Accused, by and through undersigned counsel, respectfully requests this Honorable Court to allow the defense to present advocacy, ex parte and in camera, to the Court on the theory of the case, and on the types of materials it believes is in the possession of the government which might be material for the preparation of a defense under Rule 16 or exculpatory under *Brady* and its progeny.

Dated: 17 September 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

_/s/ Linda Moreno__
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